

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be reversed and benefits should be denied as claimant did not provide timely notice of accident nor was there just cause for the delay pursuant to K.S.A. 44-520.

Claimant began working for respondent as a concrete laborer on March 18, 2002. On April 10, 2002, while helping unload a pickup, several forms which were two inches by six inches by sixteen feet long fell off the side of the truck. Claimant was struck by one or more of these forms in the head, neck and shoulders. Claimant testified he did not have any immediate pain in his head or neck, but did have pain in his right arm. Claimant's coworker and long-time friend, Dustin Mitchell, was assisting in unloading the two-by-sixes off the truck and observed the accident. As Mr. Mitchell did not testify, claimant's description of the accident is uncontroverted. Claimant testified that Mr. Mitchell asked if he needed to go to the hospital, but claimant advised he did not. Claimant worked the remainder of the day. At the end of the day, claimant rode in a truck with the crew, which included Mr. Mitchell; the foreman, Clark "Sparky" Drews; and the president of the respondent company, Brad Goodart. During this ride, claimant made no mention of the accident or any injuries associated with the accident.

That night, while climbing through a fence, claimant stepped into a hole and twisted his ankle. The next day claimant's wife contacted Mr. Goodart, advising him claimant would be unable to work because of the twisted ankle. Again, no mention was made of the accident of April 10, 2002. Claimant sought no medical treatment for his head, neck or shoulders until May 16, 2002, when he came under the care of John Gollier, M.D. At that time, Dr. Gollier was advised that claimant believed he had dislocated his right shoulder while coughing hard. There was no mention of any work-related accident while employed with respondent. During this entire time, claimant remained off work. Claimant contacted a welfare agency and obtained a medical card. He advised his welfare case worker, Cindy Hopkins, that he had been fired. When Ms. Hopkins contacted Mr. Goodart by telephone, he advised her that claimant had not been fired; he simply stopped coming to work. Mr. Goodart had earlier told claimant's wife that claimant could return to work.

Claimant testified that he sent a letter to respondent with a workers' compensation form claiming workers' compensation benefits for the April 10, 2002 accident, with the letter being mailed July 1, 2002. Mr. Goodart testified he never received any such letter or any claim form from claimant.

Claimant ultimately came under the care of Paul M. Arnold, M.D., at Kansas University Neurological Surgery. Claimant underwent an MRI, which displayed a herniated disc at C5-6, with central stenosis, right lateral recess, neural foraminal stenosis and mild disc disease at C6-7 without stenosis. Claimant underwent surgery on August 27, 2002, with Dr. Arnold, who performed an anterior cervical discectomy.

Claimant testified that after the surgery, his right arm improved to where he was having few, if any, symptoms. However, at preliminary hearing, claimant testified he was experiencing symptoms in his left upper extremity.

Claimant acknowledged that at no time did he tell his foreman (Sparky) or Mr. Goodart of the injury. Claimant's notice of accident was provided to his friend, Dustin Mitchell. The dispute in this instance centers around whether Mr. Mitchell would be considered claimant's supervisor. Claimant acknowledged no one at respondent's place of business ever told him that Mr. Mitchell was his supervisor. Claimant simply assumed Mr. Mitchell was a supervisor because he had been there longer than claimant and was being paid a salary, rather than an hourly rate for the hours worked. Mr. Goodart explained that Mr. Mitchell was paid a salary, as he had a wife and children, and the salary allowed him a regular income, rather than the sporadic income most workers earned from the uncertain hours available to construction workers. Mr. Goodart testified that Mr. Mitchell had no supervisory authority over any other worker, but was simply a coworker along with claimant, although it was acknowledged that Mr. Mitchell had been with respondent for several years and was more familiar with respondent's program and work activities than claimant.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits requested by a preponderance of the credible evidence.¹ Under K.S.A. 44-520, claimant is obligated to provide notice of accident to respondent within ten days of the date of accident, stating the time, place and particulars thereof. This notice must be provided to the employer. Notice to a coworker does not constitute notice of accident to the employer.²

In this instance, the only notice provided by claimant within the first ten days was to his coworker, Mr. Mitchell. While claimant assumed that Mr. Mitchell was a supervisor due to the fact that he was being paid a salary, there was no action on the part of respondent to justify this incorrect assumption. Additionally, claimant was in a vehicle with both his foreman (Sparky) and the respondent owner (Mr. Goodart) on the date of accident. He failed, for whatever reason, to advise either of the accident. When claimant's wife talked to Mr. Goodart on several occasions after the accident, she also failed to advise Mr. Goodart of the work-related accident and the injuries allegedly associated with it. The Administrative Law Judge found that claimant gave notice to Mr. Mitchell, a coworker, "who may or may not be a supervisor." The status of Mr. Mitchell is that of a coworker. Without some sort of supervisory responsibility, notice to Mr. Mitchell, the coworker, would be ineffective.

K.S.A. 44-520 goes on to state that failure to notify under this section will not defeat the claimant's claim if that failure to notify was "due to just cause." K.S.A. 44-520 goes on to state "except that in no event shall such a proceeding for compensation be maintained

¹ See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

² *Petrie v. Herrman's Excavating, Inc.*, No. 248,296, 2000 WL 1277569 (Kan. WCAB Aug. 30, 2000).

unless the notice required by this section is given to the employer within 75 days after the date of the accident”

The Administrative Law Judge went on to state that even if notice to Mr. Mitchell was insufficient, claimant attempted to give notice by sending respondent a letter. The court found claimant’s testimony regarding the letter to be credible and held that it satisfied the issue of notice at least for purposes of preliminary hearing. However, the letter from claimant was not mailed until July 1, 2002, approximately 83 days after claimant’s date of accident. Therefore, even if claimant were able to prove that this letter was provided to respondent, it would not be timely.

The Board, therefore, finds that claimant has failed to prove that he provided notice of accident pursuant to K.S.A. 44-520 and has further failed to prove that there was just cause for any such delay. The letter provided by claimant was well outside the 75-day time limit and would not satisfy the just cause requirement of K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated October 31, 2002, should be, and is hereby, reversed and claimant is denied benefits for having failed to satisfy the requirements of K.S.A. 44-520.

IT IS SO ORDERED.

Dated this ____ day of January 2003.

BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent
Julie A. N. Sample, Administrative Law Judge
Director, Division of Workers Compensation